". . . There is nothing in this evidence to indicate that this case will have anything to do with whether he passes or doesn't pass. *If his condition continues as it is now, the jury has a right to assume and expect that he will continue to work during the period remaining under the union contract. I suggest this argument is unwarranted and prejudicial to the defendant.*" (Appellant's Appendix, 67a) (Emphasis added)

Throughout the trial, as the result of the testimony of the plaintiff, the testimony of the medical witnesses for both parties regarding his ability to continue working, (Appellant's Appendix 32a, 40a), and the statements of both counsel and the court (Appellant's Appendix 63a, 68a) it was assumed that the plaintiff would continue working for the defendant as a brakeman in the position that he had at the time of trial as long as his physical condition remained the same. This assumption was strengthened by the fact that he had worked without interruption for the three-year period prior to the trial. Defendant's counsel offered assurances to that effect, (Appellant's Appendix 63a), and it was on this basis that the case was submitted to the jury. That the court felt that the issue of his continuing to work in his present condition was taken out of the case is clear from this instruction given to the jury:

"*The Court*: There is certainly no evidence in this case that the railroad will change its attitude towards this plaintiff as a result of your verdict.

Mr. Feeney: No, sir.

The Court: Any inference to the contrary should be utterly disregarded. No one knows what's going

to happen in the future. If you have received any inference from the argument that the plaintiff might be dismissed from the service because of this lawsuit, dismiss it from your minds, it is not warranted by any evidence in this case. In fact, under the Federal Employers Liability Act; the railroad cannot dismiss this plaintiff on account of some lawsuit he brings against it. So you can just disregard any such inference, if you have any such inference." (Apellant's Appendix 68a)

Thus there was no issue as to his intention, ability and expectation of continued work if his condition remained unchanged. Yet though it did not change, Respondent soon after trial stopped him from working.

Believing that the court and jury, as well as Petitioner and his counsel, had been misled by the misrepresentations on behalf of Respondent made by counsel at the time of trial, and that the verdict was inadequate in the light of Petitioner's being deprived of his right to work in the future, Petitioner filed a motion for a new trial pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. At the hearing on that motion, Petitioner proved that the decision to keep plaintiff out of service was based solely upon the medical testimony of one of plaintiff's doctors, and not upon an examination of the plaintiff subsequent to trial, but the District Court denied any relief from the operation of the final judgment and stated that he could not perceive any fraud or misrepresentation on the part of the defendant railroad, despite the fact that the railroad, through its counsel, assured the jury that plaintiff would be permitted to continue to work. See Opinion in Appellant's Appendix, 92a. (179 F. Supp 858, (W. D. Pa. 1960).

The Petitioner suffered a wage loss up to time of trial of $2,052.00. He had three more years to work for defendant with an undisputed earning capacity in excess of $8,000.00 a year. These figures alone total in excess of $25,000.00 without any consideration of the other elements of damage.

Petitioner appealed from the order of the District Court denying him relief from the final judgment, and on September 13, 1960, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court in refusing to give the new trial requested. See Appendix hereto, p. 23 (282 F. 2d 522 (3rd Cir. 1960)). The court held that keeping Petitioner out of service was not newly-discovered evidence, and that the argument of counsel did not remove from the jury the issue of whether the railroad might later do so. With the trial court's conclusion that fraud and misrepresentation were not sufficiently proved, the appellate court agreed, and it is to this point only that this Petition relates.

REASONS FOR GRANTING THE WRIT

FIRST POINT

If a Railroad Succeeds in Persuading a Jury to Award Only Modest Damages by Representing at the Trial of a Case That They Intend to Keep an Injured Employee in Service, and Then After Trial, With No Change in His Physical Condition, Hold Him Out of Service Solely on the Basis of His Medical Testimony, the Purpose of the F.E.L.A. Will Be Frustrated.

Here was reliance by the court, jury, litigants and counsel on a fact claimed, argued, provided and assumed: that the injured worker would have no future loss of work if his condition remained the same. The result of this reliance was a modest verdict, reflecting only past damages and future pain and suffering. It was not meant to and could not cover a complete loss of earnings in the future. Here was an issue meant by the creators of this remedial legislation to be considered by a jury if such issue existed, for the recovery of future loss of wages is one of the stoutest pillars with which the F.E.L.A. undergirds the injured worker. Respondent hoisted into the place of this pillar its intention to continue him as a worker in his present condition and the F.E.L.A. was seemingly intact. It was not until Petitioner tried to put his weight on the substitute pillar in attempting to work after trial that the F.E.L.A. caved in as to him.

This subtle but powerful ruse by Respondent can be corrected only by the intervention of this Honorable Court, which has frequently emphasized that the F.E.L.A. is to be given a liberal construction in order

to accomplish its humanitarian purposes, as have many lower federal courts and state tribunals. [1] To permit such misrepresentation to succeed is inimical to the protective concern of Congress for railroad workers in particular, and frustrating to the ideals of justice in general,

SECOND POINT

If the Judgments of the Courts Below Are Permitted to Remain, Respondent and Other Railroads Can and Probably Will Employ the Same Tactics in Future Litigation, Misleading Juries as to Future Employment of Employees, Who Though Injured, Are Able to Resume Working After the Accident Up Until the Time of Trial.

Two results are almost certain to follow:

(a) The juries' awards of damages will be inadequate to compensate injured railroad workers for loss of future earnings, denied to them when they are held out of service after trial;

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1 *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 2 L.Ed. 2d 799, 78 S. Ct. 758 (1958); *Urie v. Thompson* 337 U.S. 163, 93 L.Ed. 1282, 69 S. Ct. 1018 (1949); *Johnson v. Southern Pacific*, 196 U.S. 1, 49 L.Ed. 363, 25 S. Ct. 158 (1904); *Carpenter v. Atchison T. & S. F. Ry. Co.*, 240 P. 2d 5, 109 C. A. 2d 18 (1952); *Colasurdo v. Central R. Co. C.C. N.Y.* (1910), 180 F. 832, affirmed, C.C.A. (1911), 192 F. 901, error dismissed, (1912), 226 U.S. 617, 57 L.Ed. 383 33 S. Ct. 111; *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327 (3rd Cir. 1942); *Baltimore & Ohio R. Co. v. Branson* (1916) 98 A. 225, 128 Md. 678, reversed on other grounds 242, U.S. 623, 61 L.Ed. 534, 37 S. Ct. 244; *St. Louis I.M. & S. Ry. Co. v. Conley* (Ark. 1911) 187 F. 949, 110 C.C.A. 97; *Graham v. Thompson* (Mo.) 212 S. W. 2d 770 (1948); *Adams v. American President Lines* (1944) 146 P. 2d 1, 23 Cal. 2d 681; *Crecelius v. Chicago M. & St. P. Ry. Co.*, 223 S.W. 413, 284 Mo. 26 (1920)

(b) Railroad employees injured but able to return to work will be intimidated by knowledge of the successful trickery of railroad employers and will be unwilling to risk unemployment by bringing suit. The burden and cost of human injury, an inescapable expense of railroading, will in cases of this character be borne entirely by the employees, contrary to the clear intendment of Congress.[2]

THIRD POINT

The Decisions of the Courts Below Show a Callousness to the Plight of the Railroad Employee in the Instant Case and an Indifference to the Intentions of Congress[2] as Interpreted by This Court Such as to Justify This Court's Supervision and Correction of Them.

The district court erred grievously in refusing to give any weight at all to Respondent's deliberate assurances of continued employment so long as his condition was the same as at trial. The Court of Appeals also erred, for, although it did see some beclouding of the jury's understanding occasioned by these assurances, it held that the court's later instruction[3] wiped their vision clear. Manifestly, this was error, for even if the court believed that the circumstances did not add up to fraud, the fact is that they did add up to misrepresentation to the jury at a critical time. The appellate court placed great reliance upon the fact that at the hearing

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2 60 Congressional Record 4530.

3 "There is no evidence in this case that plaintiff is assured of a job or will be dismissed." "We all know no one knows the future but God." "No one knows what's going to happen in the future."

on the new trial motion, no evidence was introduced proving that the railroad had decided to disqualify Petitioner for service before or during trial. A realistic attitude, emanating from a court predisposed to affectuate the intent of Congress, would recognize the extreme unlikelihood of obtaining positive proof of this prior decision. Proof that the jury was misled was completed when after trial with no change in any of the facts the railroad did what it assured the jury it would not do in the absence of change in plaintiff's condition.

To allow these judgments to stand would be to return to the days when the courts whittled away the benefits of this remedial legislation. Then, as now, the court-created deficiencies were beyond the Congress's ability to correct. The words of Mr. Justice Douglas in his concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413 93 L.Ed. 497 (1949) in reference to that period are applicable here:

> "Since the condition was one created by the Court and beyond effective control by Congress, it was appropriate and fitting that the Court correct it. In fact, a decision not to correct it was to let the administration of this law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GENE K. LYNCH,
JAMES P. MCARDLE,
JOHN M. FEENEY,
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,164

GURVAN B. BROWN,
Appellant
v.
PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM ORDER DENYING RELIEF TO PLAINTIFF FROM FINAL JUDGMENT ENTERED AT NOS. 14,446 AND 14,449 ON JANUARY 4, 1960, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued May 6, 1960
Before KALODNER, HASTIE and FORMAN, *Circuit Judges*.

Opinion of the Court

(Filed September 13, 1960)

By FORMAN, *Circuit Judge*.

This case arises under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq. Following a trial in which he recovered a judgment for $15,000, Gurvan B. Brown, appellant, moved for relief from judgment[1] by

1 Brown's attorney resorted to Rule 60(b) since the ten-day period during which Rule 59 could be invoked had expired.

way of a new trial limited to the issue of damages pursuant to Rule 60(b), Federal Rules of Civil Procedure, 28 U.S.C.A.[2] The motion was denied, Brown v. Pennsylvania R. Co., 179 F. Supp. 858 (W.D. Pa. 1960) and Brown appeals.

Two cases were involved, which were consolidated for purposes of pre-trial and trial. The first case concerned an accident which occurred on December 27, 1953, while Brown was employed as a conductor. Liability was denied by the appellee, Pennsylvania Railroad Company. It also alleged plaintiff was contributorily negligent. The second case concerned an accident which occurred on January 7, 1956. There Brown was employed as a brakeman. Liability was admitted and there was no evidence that Brown was contributorily negligent. As a result of the first accident, Brown lost approximately one week's work but he had no medical expenses and received no medical treatment. As a result of the second accident, Brown sustained a wage loss of approximately $2100. His actual and prospective medical expenses were less than $1,000. During the period of almost three years intervening between his return to work following his second

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2 Rule 60(b) in pertinent part is as follows:

"(b) Mistakes; Inadvertence, Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . ."

accident and the trial date, Brown lost no time from work.

At the trial, there was conflicting testimony as to the effects of the accidents suffered by Brown. Brown's principal medical witness contended that his patient had sustained, inter alia, a ruptured disc for which he recommended surgery. Brown, however, refused to follow this recommendation because of the hazards involved. The doctor testified that Brown was unemployable in the labor market. He further stated that the disc condition would become acute and that Brown would eventually submit to surgery, from which a residual disability was probable. The doctor stated that hernias might develop which would be referable to the accident. He testified that Brown was under constant sedation. Brown contended that he had sustained a considerable loss of earning power; that his disability might increase in the future and that he faced the possibility of being laid off; and that although he had been working without interruption up to the trial, he did so on sheer nerve and expected to continue so doing. On the other hand, the Railroad argued that as of the time Brown returned to work following his second accident, he had recovered from his injuries, was able to work and did so as before, and that his earning power had not been diminished as a result of any injury he had suffered in the two accidents.

Brown continued to work at his regular job for several weeks after the case ended. At that time he was called for a conference with the Railroad's doctor, who informed him that he was not medically qualified to continue his duties as a trainman. This opinion was based on the testimony given by Brown's medical witnesses at the trial. Subsequently, Brown received a letter from

the Railroad stating that he was being held out of service at the recommendation of its doctor. This action of the Railroad prompted Brown to make a post-trial motion.

In his attempt to gain a new trial, Brown has pursued a somewhat confused course. In his motion to the district court for a new trial under Rule 60(b) (3),[3] he asserted:

> ". . . that the position taken by the defendant at the time of the trial of this case is in complete contradiction with the position it has taken since the trial of his case and amounts to a fraud and misrepresentation, the purpose of which was to substantially reduce the verdict to which plaintiff was entitled and the action taken by it since the trial caused plaintiff financial harm as a result of his having exercised his rights under the Federal Employer's Liability Acts and as a result, thereof, plaintiff has been deprived of a fair trial on the issue of damages . . ."

The district court noted that in support of that motion Brown in his brief contended that he was entitled to a new trial on the ground of newly-discovered evidence pursuant to Rule 60(b) (2).[4] This newly-discovered evidence apparently was his being held out of service after the trial, of which he had no knowledge before or during the trial. In his brief to this court, Brown repeats the two grounds for a new trial and in addition argues that the district court committed reversible error in withdrawing from the jury the issue of whether he might

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3 *Ibid.*
4 *Ibid.*

be held out of service by the Railroad after the trial. We shall discuss these contentions in inverse order.

During the closing argument of Brown's attorney, defendant's counsel objected, and the following exchange took place:

> "*Mr. Feeney*:—Questions have come into this case about whether or not Mr. Brown is able to continue working. He says he is. That is on his present condition. Of course, as Dr. Boone said, if he is not found qualified, he can be taken out of service. Now, will Mr. Brown continue to be qualified? Will he continue to be passed by the railroad doctors after this case is over? You must remember that when he first went back to work—you have to consider something together here. One of the bigger claims by Mr. Pringle in this case which he has harped on repeatedly, is the fact, 'Look at this man, he has worked and worked and worked. He has lost no time, he went back to work in April, 1956 and has worked ever since.'
>
> "Now, does that impress you? Well, sure. Sure, it's difficult to go to work if you have a bad back. Some people can do it. But it's intended to say to you indirectly that this man couldn't have a bad back if he went back to work and has worked.
>
> "Now, in April of 1956, when this man said, 'I want to go back to work,' he had a medical examination by the doctor down at Conway, Dr. Boone, and then Dr. Boone discussed the case with his superior and with the claim department, the same old claim department that runs lawsuits, who knew that someday they would be faced with talking

about this case to you twelve jurors, or some twelve people, and after a discussion with the claim department, which was not elaborated upon, Mr. Brown was sent back to work, said he could go back to work.

"Now, can he continue? He has a periodical coming up. Can they pull him out of service if they find or if they say we believe—

"*Mr. Pringle*:—I am sorry to interrupt. I object to this argument as improper and not warranted by any evidence in this case. The argument started with this question to the jury, 'Will Mr. Brown be passed by the railroad doctors in the future as qualified for employment?' There is nothing in this evidence to indicate that this case will have anything to do with whether he passes or doesn't pass. If his condition continues as it is now, the jury has a right to assume and expect that he will continue to work during the period remaining under the union contract, I suggest this argument is unwarranted and prejudicial to the defendant.

"*The Court*:—There is no evidence in this case that plaintiff is assured of a job or will be dismissed.

"*Mr. Feeney*:—No, sir, neither way.

"*The Court*:—Is there any evidence he is to be examined?

"*Mr. Feeney*:—Yes, sir. There is evidence he has a periodic coming up any day.

"*Mr. Pringle*:—But the trend of this argument and the purpose of it obviously is to create the im-

pression that maybe there will be a change of attitude after this case is over. I resent that. I object to it as not warranted under the evidence or under any of the testimony and as unfair and prejudicial to the defendant, and move for the withdrawal of a juror.

"*The Court*:—There is certainly no evidence in this case that the railroad will change its attitude toward this plaintiff as a result of your verdict.

"*Mr. Feeney*:—No, sir.

"*The Court*:—Any inference to the contrary should be utterly disregarded. No one knows what's going to happen in the future. If you have received any inference from the argument that the plaintiff might be dismissed from the service because of this lawsuit, dismiss it from your minds, it is not warranted by any evidence in this case. In fact, under the Federal Employers Liability Act, the railroad cannot dismiss this plaintiff on account of some lawsuit he brings against it. So you can just disregard any such inference, if you have any such inference. I am not exactly sure that counsel for the plaintiff meant you to have any such inference. He has a perfect right to argue to you from the evidence what will happen in the future so far as this man's earning power is concerned, so far as his pain and suffering is concerned, as did the defendant's counsel argue to you to the contrary. We all know no one knows the future but God, and we have to do the best we can from evidence, and counsel is at liberty to argue evidence to you from any angle he chooses.

"Now, I think they understand.

"*Mr. Feeney*:—And I did not intend that inference, your Honor."

Plaintiff argues that as a result of this exchange, the jury was precluded from considering the issue of his future disqualification for service. We cannot accept this argument. Rule 51, Federal Rules of Civil Procedure, make it perfectly clear that:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds of his objection."

The plaintiff made no objection. Furthermore, the court did not instruct the jury that plaintiff could not be disqualified for service because of anything that happened during the trial but merely negatived any inference that plaintiff could be disqualified as a reprisal for bringing the suit. In fact, plaintiff's counsel agreed with the court.[5] Moreover, the alleged improper instruction did not lay a ground upon which Rule 60(b) could be invoked, since it is not a substitute for appeal. Title v. U.S., 263 F.2d 28 (9th Cir. 1959).

The disqualification of plaintiff for service approximately one month after the close of the case does not qualify as "newly discovered evidence" within the purview of Rule 60(b)(2). That phrase refers to evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant. Campbell v.

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5 We make no comment on the court's statement that Brown could not be discharged because of bringing an action against the Railroad since it is not in issue and there is no evidence to support a charge that Brown was disqualified for service for such a reason.

American Foreign S.S. Corporation, 116 F.2d 926 (2d Cir. 1941); Schuyler v. United Air Lines, 94 F.Supp. 472 (M.D. Pa. 1950) affirmed 188 F.2d 968 (3rd Cir. 1951). The Railroad had not acted to disqualify Brown for service at the time of the trial.

Finally, Brown urges that the Railroad's conduct during the trial amounted to fraud and misrepresentation in view of his later disqualification for service. The conduct complained of was the assurance given by the Railroad counsel to the jury that Brown was secure in his employment. It should be recalled that at one point Railroad's counsel did make the following statement:

> "If his condition continues as it is now, the jury has a right to assume and expect that he will continue to work during the period remaining under the union contract, I suggest this argument is unwarranted and prejudicial to the defendant."

However, it would appear that the court properly instructed the jury that: "There is no evidence in this case that plaintiff is assured of a job or will be dismissed." The court further commented that: "We all know no one knows the future but God" and that "No one knows what's going to happen in the future."

In order to sustain the burden of proving fraud and misrepresentation under Rule 60(b)(3), the evidence must be clear and convincing. Atchison, Topeka and Sante Fe Railway Co. v. Barrett, 246 F.2d 846 (9th Cir. 1957); Assman v. Fleming, 159 F.2d 332 (8th Cir. 1947). No evidence was introduced at the hearing on this motion in the district court which would support a conclusion that the Railroad had decided to disqualify Brown for service before or during the trial. In fact, Brown

introduced at that hearing the deposition of Dr. William Woodward, the Regional Medical Officer for the Railroad, in which he stated it was only after the trial that he examined the testimony of Brown's medical witness and recommended Brown's disqualification for service based on that testimony. And this court has held that it is not fraudulent for an employer to contradict a plaintiff's medical testimony during a trial and then choose to rely on it as a basis for dismissing plaintiff after trial. Bassett v. New York Chicago and St. Louis Railroad Co., 235 F.2d 900 (3rd Cir. 1956).

The motion for relief from judgment is addressed to the sound discretion of the trial judge. Delonza Corporation v. Sacks, 265 F.2d 157 (3rd Cir. 1959); Atchison, Topeka, and Santa Fe Railway Co. v Barrett *supra*. Since we find no clear abuse of that discretion, and for the reasons stated herein, the order denying relief from judgment by way of new trial will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,164

GURVAN B. BROWN,
Appellant
vs.
PENNSYLVANIA RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and FORMAN, Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case and the order denying the motion for new trial be, and the same are hereby affirmed, with costs.

Attest:
IDA O. CRESKOFF
Clerk

September 13, 1960

RECEIVED AND FILED
SEP. 13, 1960
IDA O. CRESKOFF
Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 16 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

Supreme Court of the United States

OCTOBER TERM, 1960

No. 562

GURVAN B. BROWN, *Petitioner*,

v.

PENNSYLVANIA RAILROAD COMPANY, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether, in the circumstances of this case a unanimous court of appeals correctly held that the trial court had not abused its discretion by denying petitioner's motion under Rule 60(b)(3) of the Federal

Rules of Civil Procedure for relief from a judgment of $15,000 entered in his favor.

STATEMENT

This is an FELA case. Petitioner recovered a jury verdict in the amount of $15,000, upon which judgment was duly entered.[1] Neither party appealed from that judgment, and the time for appeal therefrom has long since expired.

Some weeks subsequent to trial respondent notified petitioner that he was being held out of service for medical reasons.[2] Petitioner thereupon moved under Rule 60(b)(3) for relief from the final judgment and for a new trial on the issue of damages. After presentation of evidence by petitioner in support of his motion and oral argument, the trial court denied petitioner's motion. This denial was affirmed by the court of appeals.

Thus petitioner is not here because a jury verdict in his favor has been taken away by the trial court, or by the court of appeals. Rather, he is here solely because of a disagreement with the holding of the judge before whom his case was originally tried, affirmed by a unanimous court of appeals, that the proofs presented by him on a motion under Rule 60(b)(3) to reopen the judgment as to damages were not sufficient

[1] Petitioner claimed neck, back and leg injuries from two accidents, both of which had occurred more than three years prior to trial. His loss of wages during a four month period when he was allegedly unable to work because of these injuries amounted to $2,052. His medical expenses, actual and prospective, were less than $1,000. (Appellant's App., p. 94a).

[2] This notice did not dismiss petitioner from respondent's service; he is still an employee and his seniority and pension rights are unaffected.

to make the showing of fraud or misrepresentation necessary to entitle him to that extraordinary relief.[3]

The statement of facts set forth by petitioner's statement of the case requires supplementation and correction in the following respects:

At the trial there was a sharp conflict in the medical testimony offered by the parties as to the extent of petitioner's injuries. Petitioner's physicians testified that petitioner since his accident had required, and at the time of trial still required, frequent narcotic medication for relief from pain (Appellant's App., p. 37a), that movement could aggravate petitioner's condition so greatly that he would require surgery (*id.*, pp. 38a, 43a), and that petitioner's injuries could be aggravated by "leaning over to tie a shoelace", "a twist with strain on the back", or even a "severe sneeze" (*id.*, p. 48a). The physician who had been responsible for treating petitioner testified that on the basis of his experience as an examining physician for various employers, were he examining petitioner for employment knowing of his condition and symptoms he would consider him unemployable and would not recommend him for employment because of the danger of an aggravation of the condition (*id.*, p. 41a).

The testimony of respondent's physician witnesses conflicted sharply with that of these witnesses of petitioner. A doctor who had twice examined petitioner on behalf of respondent testified that in his opinion

[3] In the trial court petitioner urged that the notice to petitioner constituted newly discovered evidence and that an improper instruction by the court had precluded the jury from considering the possibility of petitioner's future disqualification from active service in its assessment of damages. These points have been expressly abandoned by petitioner in this Court (Petition, p. 8).

petitioner had completely recovered well before trial from any injury which he might have sustained in the accidents for which damages were claimed and that petitioner's condition appeared to be such that he could continue to work without hazard (*id.*, pp. 55a-56a).

It was on this state of the record that, during summation to the jury, respondent's counsel made the statements that petitioner now claims to have constituted "assurances" that petitioner's employment on active duty by respondent would continue, and that formed the sole basis for petitioner's motion for relief from judgment.

REASONS FOR DENYING THE WRIT

Petitioner has secured a jury verdict and a substantial award of damages. His motion for the extraordinary remedy of relief from judgment under Rule 60(b)(3) has been given full consideration and has been found wanting in merit by the same judge who presided over the trial in which the judgment was rendered, and who thus would have been a victim of the asserted "fraud", and by a unanimous court of appeals. The case presents no discernible issue of law. It turns on its own unique facts. Petitioner has pointed to no conflict with the decision of any court, state or federal, and in fact there is none. There is no warrant for further review.

It is well settled that a motion of the kind here involved is directed to the discretion of the trial court; that it requires clear and convincing proof and that the decision of the trial court will not be reversed except for gross abuse of discretion. See *Atchison, T. & S. F. R. Co.* v. *Barrett*, 246 F. 2d 846 (9th Cir. 1957); *Parker* v. *Checker Taxi Co.*, 238 F. 2d 241

(7th Cir. 1956), *cert. denied*, 353 U.S. 922. This rule should and does operate with particular force when, as here, the judge to whom the motion is addressed is the same judge who presided at trial and who, having "felt the 'climate' of the trial" is peculiarly competent to decide whether in fact fraud or misrepresentation has been practiced. See *Atchison, T. & S. F. R. Co. v. Barrett*, *supra*, at p. 849; *Parker* v. *Checker Taxi Co.*, *supra*, at p. 244.

The decisions of the courts below are plainly correct on the facts and therefore no question of error, much less of abuse of discretion, is presented.

Petitioner does not claim that his physical condition, as testified to by him and his physicians under oath at trial, did not warrant respondent's decision to hold him out of service. Nor does he make any serious contention that respondent had decided to disqualify him from service before or during the trial.[1] Petitioner's whole case is based on the assertion, several times repeated in his petition (pp. 5, 6, 7), that respondent's counsel in addressing the jury gave "assurances" that petitioner would continue to be employed on active duty by respondent, and that respondent's decision subsequent to the trial to hold petitioner out

[1] Petitioner had at no time prior to trial given respondent a complete report of his physicians' views as to his physical condition (Appellant's App., p. 80a). When petitioner was examined prior to trial by a physician representing respondent, his "complaints were of no serious nature" and he did not disclose that his physician had recommended that he undergo an operation (*id.*, p. 55a). It was only after the trial that the medical officer of respondent who subsequently recommended that petitioner be held out of service had an opportunity to examine the trial testimony of petitioner's medical witnesses (*id.*, p. 78a) and the district court found that "there is no evidence to show that any of defendant's representatives knew before trial or at trial that plaintiff would be held out of service after the trial" (*id.*, p. 99a).

of service for physical disability made these alleged "assurances" fraudulent. In fact no such assurances were given.

Two of the three passages pointed to by petitioner as constituting such "assurances" are nothing more than parts of a summary by counsel of the testimony of one of respondent's physician witnesses, to the effect that *assuming* the correctness of that witness' view of petitioner's physical condition "he will go on and work steadily as he has in the past" (See Petition, pp. 5, 6; Appellant's App., pp. 63a, 64a). To characterize these comments as "assurances" that irrespective of petitioner's *actual* condition he could continue satisfactorily in active employment is simply to ignore the fact that the very question at issue in the litigation was whether the view of petitioner's physicians or that of respondent's physicians as to petitioner's condition was correct—a question which the jury thereafter resolved adversely to respondent.

The statement upon which petitioner relies most heavily was part of an objection by respondent's counsel to a statement by counsel for petitioner which appeared to suggest that petitioner might be discharged by respondent in retaliation for having brought the lawsuit.[3] In the course of this objection respondent's

[3] That the court as well as respondent's counsel took this as the purport of petitioner's counsel's statement is shown by the court's immediate instruction to the jury that:

> "If you have received any inference from the argument that the plaintiff might be dismissed from the service because of this lawsuit, dismiss it from your minds, it is not warranted by any evidence in this case. In fact, under the Federal Employers Liability Act the railroad cannot dismiss this plaintiff on account of some lawsuit he brings against it" (Appellant's App., p. 68a).

counsel stated that the jury had a right to expect that petitioner would continue to work "*if his condition continues as it is now*" (Appellant's App., p. 67a). This statement was entirely consistent with the position respondent had taken throughout the trial that petitioner's injuries had never been serious and were fully healed and in no way disabling. These remarks cannot be tortured into an assurance, or even a suggestion, that respondent was in any sense guaranteeing petitioner's future employment even if respondent's view as to his condition should be rejected by the jury.

Both the trial court and petitioner's counsel plainly recognized that the statement had no such import. Immediately after it was made the court pointed out to the jury that "there is no evidence in this case that plaintiff is assured of a job or will be dismissed"; "we all know no one knows the future but God"; and "no one knows what's going to happen in the future" (Appellant's App., pp. 67a-69a). Similarly, a few minutes after the remark upon which petitioner now relies his counsel explicitly urged the jury to consider the possibility that knowledge by respondent of petitioner's physicians' views as to petitioner's condition might make him unemployable, stating:

> "Dr. Faix testified that from his experience of examining for different companies that he felt this man's condition, if known to the company, would make him unemployable. Now, that means that if he is not working for the railroad, does he have any earning capacity?" (Appellant's App., p. 69a.)

There could hardly be a clearer and more specific contemporaneous recognition by petitioner's counsel that

respondent had in fact given no "assurances" as to the continuation of petitioner's employment.[6]

The substantial damages awarded petitioner by the jury indicated to respondent that the jury had accepted petitioner's position and testimony as to the nature and extent of his injuries. At this point it would have been foolhardy for respondent to continue to adhere, for purposes of deciding whether petitioner could safely be kept on active duty, to its position as to the inconsequential nature of petitioner's injuries. There is certainly no fraud in the fact that respondent sought in good faith to contradict petitioner's medical testimony during trial and then, after that testimony had been confirmed by a verdict, gave it weight in deciding to hold petitioner out of active service.[7] See *Bassett v. New York, C. & St. L. R. Co.*, 235 F. 2d 900 (3d Cir. 1956). For, as the trial court pointed out in its opinion denying petitioner's motion, had respondent elected under these circumstances to keep petitioner on active duty "certainly it would run a risk of future litigation and liability for additional damages." (Appellant's

[6] Petitioner had ample opportunity to argue, and in fact did fully argue, to the jury the possibility of petitioner being held out of service subsequent to the trial. In describing the argument of petitioner's counsel to the jury, the district court noted:

> "He stressed the prospect that plaintiff might be found disqualified because of his alleged disability and held out of service after the termination of the trial. He argued that plaintiff was unemployable if not working for the Railroad and that his wages could suddenly be cut off."

The court cited several pages of the transcript in support of this statement (Appellant's App., 95a-96a).

[7] The trial court expressly found that respondent "honestly disputed plaintiff's medical contentions" at the trial (Appellant's App., p. 99a).

App., p. 98a) See *Dunn* v. *Conemaugh & Black Lick R. Co.*, 267 F. 2d 571 (3d Cir. 1959); *Nuttall* v. *Reading Co.*, 235 F. 2d 546, 549 (3d Cir. 1956).

CONCLUSION

The decision below presents no issue of law, does not conflict with any other decision of any court, and is plainly correct. Accordingly, the petition should be denied.

Respectfully submitted.

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